

TORTIOUS INTERFERENCE WITH ADVANTAGEIOUS BUSINESS RELATIONSHIP: WHEN DOES COMPETITION BECOME INTERFERENCE?

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Competition is the rivalry among sellers trying to achieve the objectives of increasing profits, market share, and sales volume by varying the elements of the marketing: price point, product identity, distribution levels, and promotion. Merriam-Webster defines competition in business as "the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms." Sometimes those two competing parties push the boundaries of fairness and even cross it.

Unfair competition in commercial law refers to a number of areas involving acts by one competitor or group of competitors which harm another in the marketplace. Such conduct may give rise to criminal offenses and civil causes of action. The most common actions falling under the banner of unfair competition include: antitrust violations, predatory pricing, trademark infringement, misappropriation of trade secrets, overbroad restrictive covenants, and tortious interference.

Tortious interference occurs when one competitor convinces a party having a relationship with another competitor to breach a contract or duty to the other competitor. To prove a claim for tortious interference, the aggrieved party must establish: (1) the existence of a business relationship not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with that relationship by the defendant; and (4) damage as a result of the breach of relationship. Linafelt v. Beverly Enterprises-Florida, 745 So.2d 386, 389 (Fla. 1st DCA 1999).

Generally, a tortious interference claim exists only against persons who are not parties to the contractual relationship. Cox v. CSX Intermodal, Inc., 732 So.2d 1092 (Fla. 1st DCA 1999) quoting West v. Troelstrup, 367 So.2d 253, 255 (Fla. 1st DCA 1979). A claim for tortious interference cannot lie where the alleged interference is directed at a business relationship to which the defendant is a party. "In other words, the interfering defendant must be a third party, a stranger to the business relationship." Romika-USA, Inc. v. HSBC Bank USA, N.A., 517 F.Supp.2d 1334, 1138 (S.D. Fla. 2007). Causation is established when one intentionally and improperly interferes with a business relationship between two *other* parties by 'inducing or otherwise causing' one party to breach or sever the business relationship. Goussard v. Adia Services, Inc., 723 So.2d 182, 184 (Fl. 1998) (quoting from the Restatement (Second) of Torts § 766 (1979)). The analysis is very factual and very much dependent upon the circumstances surrounding the unfair act.

Arguably, the most important aspect of the tortious interference claim is that of damages. The speculative hope of future business is not sufficient to sustain damages for the tort of interference with a business relationship. Douglass Fertilizers & Chem., Inc. v. McClung Landscaping, Inc., 459 So.2d 335 (Fla. 5th DCA 1984). A plaintiff may properly bring a claim alleging tortious interference with present or prospective customers but no cause of action exists for tortious

interference with a business' relationship to the community at large. Uncertainty as to the amount of damages or difficulty in proving the exact amount will not prevent recovery where it is clear that substantial damages were suffered and there is a reasonable basis in the evidence of the amount awarded. Insurance Field Services, Inc. v. White & White Inspection and Audit Service, Inc., 384 So.2d 303, 308 (Fla. 5th DCA 1980). Such a damage analysis needs to be supported by the expert testimony of an economist, accountant or other business forensic analyst.

Such damages analysis should include lost profits, but the recovery of lost profits has been limited. In Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 815 (Fla. 1994), the Supreme Court found that the plaintiff was entitled to damages that could reasonably flow from the defendant's interference. This included an award for damages for lost profits on existing orders, but that an award for damages for past customers was not proper because those customers did not have an identifiable agreement to repurchase goods from plaintiff. Similarly, the damages were not recoverable for speculative future sales.

If the party competing proves the interference was actually lawful competition, they will not be found to have committed the tort. Additionally, there is no basis for the recovery of attorney's fees for tortious interference. As a result, the prosecution and defense of such a claim can be costly and expert testimony will be needed to support the damages claim thus further increasing litigation costs. However, such a claim can be a means to keep aggressive and unscrupulous competitors in check.

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